JD–37–08
Gaithersburg, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BRAGA CONSTRUCTION CO., INC.

and Case 5–CA–33630

REINFORCING IRON WORKERS
LOCAL UNION NO. 201

Stephanie Cotilla Eitzen and Isael Hermosillo, Esqs.,
for the General Counsel.
Bernard J. Cooney, Esq., of Silver Spring, Maryland, for
the Respondent.
Juan Carlos Recinos, of Washington, D.C., for the
Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C., on March 24–25, 2008. The charge in Case 5–CA–33570 was filed April 25, 2007, by Reinforcing Iron Workers, Local Union No. 201 (the Union), but withdrawn on June 4.[1] A new charge was filed June 1 and the complaint issued August 31. The complaint alleges that Braga Construction Co., Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: on April 10, threatening to discharge employees for wearing shirts promoting the Union (union shirts), promising to rehire them if they took the shirts off, and coercing employees not to wear union shirts; on April 11, threatening employees with discharge for handing out union flyers at the worksite; on April 18, coercing employees against wearing union shirts and threatening to discharge employees who wore union shirts. The complaint further alleges the Respondent violated Section 8(a)(3) and (1) on April 24, by discharging employees Darwin Godoy and Kevin Cruz because they engaged in concerted protected activities. On September 18, the Respondent denied the material allegations and referred to its May 2007 position statement.

After opening the record, I ruled on two motions and reserved decision on another. The first motion, the Respondent's petition to partially revoke the General Counsel's subpoena duces tecum, was partially granted as to paragraph 8 of the subpoena.[2] The second motion sought to preclude the General Counsel's late amendments to the complaint. I denied the Respondent's motion and granted the General Counsel's motion to amend the complaint.[3]

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[1] All dates are in 2007 unless otherwise indicated.
[2] ALJ Exh. 1; Tr. 11–15.
[3] ALJ Exh. 2; Tr. 15–22.

The third motion was an application by the General Counsel for a ruling *in limine* precluding the Respondent from questioning witnesses about their residency status or social security numbers during the unfair labor practice portion of the case. The Respondent opposed the motion and moved to dismiss on the ground that, based upon information obtained from the Department of Homeland Security, the alleged discriminatees used false social security numbers and, thus, would be precluded from obtaining reinstatement and backpay. I reserved decision on the motion at that point, but addressed it immediately before the General Counsel commenced her examination of a witness to whom the issue applied. Relying on *Hoffman Plastics Compound v. NLRB*, 535 U.S. 137 (2002), *Concrete Form Walls*, 346 NLRB 831 (2006), *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984), and *Intersweet, Inc.*, 321 NLRB 1 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997), I ruled that, given the broader remedies available to the Board beyond those of employee reinstatement and backpay, the issues of residency status and/or a fraudulent social security number were more appropriately left for the compliance phase of the proceeding. Accordingly, I granted the motion *in limine* and denied the Respondent's motion to dismiss.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Maryland corporation with its principal place of business in Gaithersburg, Maryland, has been engaged as a concrete subcontractor in the construction industry. On an annual basis, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 in the Commonwealth of Virginia and the District of Columbia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Respondent's Operations and Procedures

The Respondent installs the concrete portion (slab on grade, columns, and floors) of parking garages constructed in the Washington, D.C. metropolitan area. During the period of December 2006 to April 2007, the Respondent performed work at four projects: (1) a parking garage at the Dulles Station project site in Herndon, Virginia;[5] (2) a parking garage and condominium project at the Wheaton Metro Station in Wheaton, Maryland (Wheaton project site); (3) at a parking garage at the National Harbor project site in Oxon Hill, Maryland; and (4) a slab-on-grade foundation for a condominium project in Laurel, Maryland. The Respondent typically employs a foreman and four or five reinforcing iron workers on each project. It transfers workers, as needed, from one project site to another.[6]

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[4] Tr. 24–33, 94–98,115–118.

[5] There was confusion over the location of Dulles Station. (Tr. 43–44.) The website for the development (http://www.dullesstation.com/home.htm) indicates it is located in Herndon, VA.

[6] Tr. 42–46, 78–79, 104–105.

Respondent does not require that its employees wear a uniform, but requires them to wear long pants, boots, a hard hat, safety glasses, and, usually, a long-sleeve shirt. Employees are not permitted to use cellular telephones when on the job because they distract them from their work. The Respondent did not have a written personnel policy, but employees were given a verbal orientation and instructed as to what was expected of them at work.[7]

Luis Gomes is the Respondent's president; Ali Daneshpour is vice president. Giovanni Acosta was a foreman at the Wheaton and Dulles Station project sites. Porfirio Domenech was a supervisor at the National Harbor project site. Darwin Godoy, Kevin Cruz, and Mario Estrada worked as iron workers at the Wheaton, Dulles Station, and National Harbor project sites. Godoy started in March 2006. In December 2006, he worked at the Wheaton project site. Kevin Cruz started in January 2007, and was assigned to that location as well. Both continued to work at the Wheaton project site until March 2007. In March, Godoy and Cruz started working at the National Harbor project site 1 or 2 days a week. In April, they started working at the Dulles Station project site.[8]

B. The Organizing Campaign

In December 2006, Union Organizer Juan Recinos began approaching the Respondent's employees at the Wheaton project site. Among other things, they discussed the wages paid to the Respondent's employees at that work location. Recinos advised them that work performed on that project was covered by the Davis-Bacon Act and subject to the local prevailing wage paid on similar projects, which would be higher than what they were being paid.[9] He continued to visit the Wheaton project site during working hours and attempted to promote the Union. At Acosta's request on at least one occasion, however, he left. On three or four occasions from January to March, Recinos met with several of the Respondent's employees at a restaurant near the Wheaton project site after work hours. Acosta, Godoy, and Cruz attended all of these meetings. Recinos addressed employees' complaints about wages, explained the benefits of union representation and campaign tactics, including wearing prounion shirts at the Respondent's project sites. After explaining the purpose of the union authorization cards, Recinos asked employees at the meetings to sign them. Godoy and Cruz signed cards on January 19.[10]

Acosta knew that Godoy, Cruz, and other employees signed union authorization cards, but did not do so at the time. On February 22, Acosta met with Recinos and Kevin McVeigh, the Union's business agent. Based on his concerns regarding wages, and his lack of medical insurance and pension benefits, he signed an authorization card. Acosta did not tell any of the

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[7] The testimony of Ali Daneshpour, the Respondent's vice president, regarding the Company's verbal policy regarding work attire was not disputed: "It's supposed to be long pants and long sleeve *usually* and, and boots." (Tr. 242–243.)

[8] Tr. 41, 104–109, 157–159, 183, 282, 293.

[9] The Davis-Bacon Act requires contracts on federally-funded projects over $2,000 to contain clauses requiring that various classes of laborers and mechanics be paid no less than the locally prevailing wages and fringe benefits paid on projects of a similar character. See 29 CFR Parts 1, 3, and 5.

[10] The testimony of Acosta, Godoy, and Cruz regarding their involvement with Recinos and discussion about seeking a higher wage rate, and the Respondent's awareness of that activity, were undisputed and corroborated by Daneshpour's testimony and position statements of May 4 and June 25, 2007. (Tr. 49–54, 73, 81–82, 89, 119, 122, 126–128, 153, 162–166, 184–185, 192–196, 199–200, 257–260, 270–275; GC Exhs. 4, 4(a), 5, 5(a), 29–30.)

Respondent's supervisors or employees that he signed the card. However, he later decided that he was not interested in creating problems with the Respondent and told his employees that they "were not obligated to be represented by the Union."[11]

On March 1, Recinos delivered a letter from McVeigh to Luis Gomes, the Respondent's president. The letter requested a meeting to discuss voluntary recognition of the Union. Recinos followed up with a telephone call. Gomes initially agreed to meet. However, he later changed his mind and told Recinos he wanted "nothing to do with the Union." Gomes added that employees interested in the Union should go to work for the Union.[12] Sometime in March 2007, Daneshpour followed up by approaching Acosta about the Union's request. Acosta revealed to Daneshpour that Godoy and Cruz "were unhappy" with their wage rate and that Recinos had promised them more if the Respondent voluntarily recognized the Union.[13]

C. Employees' Use of Union Shirts

As a result of the Respondent's refusal to recognize the Union, Recinos distributed red shirts to the Respondent's iron workers. The shirts stated in English and Spanish on the front: "WE DEMAND REPRESENTATION BY RODMAN LOCAL 201 NOW!!!" On the back, the Union's insignia was in between the words "RODMAN" and "LOCAL 201, WASHINGTON, D.C." Acosta knew prior to April 10 that Recinos planned to distribute these shirts to his employees.[14]

At around 7:15 a.m. on April 10, Godoy and Cruz showed up for work at the Dulles Station project site wearing prounion shirts. They were about 15 minutes late. When they arrived, they were approached by Acosta and the two other iron workers on the site to look at the shirts. Concrete had been delivered and was ready to be poured. However, Acosta was shorthanded without the late arriving Godoy and Cruz. Nevertheless, Acosta told Godoy and Cruz they could not wear the shirts while working and to leave the worksite. He followed Godoy and Cruz to their cars, where he told them to change their shirts, get their tools, and return to work. They agreed to return to work, but refused to remove the shirts. Acosta then told them to leave.[15]

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[11] Acosta's explanation as to why he attended the union meetings with an interest in higher wages, yet opposed legal action or other form of aggressive organizational campaign tactics against the Respondent, was very credible: "I was just in the middle because I didn't want to be in problem with any of the two groups." (Tr. 198, 255–259, 274–277.)

[12] The testimony of the Respondent's witnesses and its June 25, 2007 position statement established its antiunion posture throughout the entire organizing campaign. (Tr. 206–207, 284–285; GC Exhs. 7, 30.)

[13] Daneshpour's testimony indicates that it was not until a few weeks after the union activity began that Acosta told him of Godoy and Cruz' interest in higher wages. (Tr. 72–73.)

[14] Acosta conceded that he knew Recinos planned to distribute prounion shirts to the employees. (Tr. 207–209, 257–258; GC Exhs. 8–11.)

[15] It is not disputed that Cruz and Godoy arriving at the worksite wearing prounion shirts resulted in Acosta and the other two iron workers coming over to read the wording on the shirts. However, Acosta's alleged concerns—the time sensitivity in pouring just-delivered concrete, concentration of the workers, and being two workers short—were not credible. Based on the credible testimony of Cruz, Godoy, and another iron worker, Mario Estrada, it is clear that Acosta decided it was more important to have them leave the worksite, remove the shirts and return, or even worse, go home. In any event, Acosta clearly did not tell Cruz and Godoy to simply remove their shirts and start working, since there is no indication that they had a change of clothing at the actual worksite. (Tr. 90, 129–132, 167–169, 187, 261–264, 279–281.)

At approximately 7:30 a.m., Acosta called Recinos and recounted the incident with Godoy and Cruz. He explained that he directed them to remove the shirts "because the message on the shirt was too strong." They refused and he told them to leave.[16] A few hours later, Acosta told Cruz he could return to work if he did not wear the union shirt. Cruz agreed. Later that afternoon, Acosta called Godoy by telephone and told him to report to the Wheaton project site at 12:30 p.m. the next day.[17] Acosta then went to Respondent's offices and gave Nuno Gomes, Respondent's personnel officer, one of the union shirts.[18]

Absent the prounion shirt, Godoy returned went to work at the Wheaton project site on April 11. When Godoy arrived, Acosta asked him if he wanted to continue working. Acosta told him that if he wanted to return to work, he could not wear the union shirt. Godoy agreed to no longer wear the union shirt to work, but said that he would always support the Union. Acosta acknowledged that, but warned that, as a result, Godoy would lose his privileges and overtime work opportunities, and would be terminated if he ever arrived late to work. After speaking to Acosta on April 11, Godoy met with Recinos and they went to the general contractor's office to verify the wage rate that the Respondent paid its employees. They obtained copies of the Davis-Bacon Act's prevailing wage rates, which Godoy then distributed to coworkers. Godoy returned to work at the Wheaton project site on April 12.[19]

On April 18, during Godoy's lunch break at the Dulles Station jobsite, Luis Gomes approached him and engaged in small talk before asking why he supported the Union. Gomes then told Godoy that it was wrong to wear the union shirt. He added that the Company did not want to affiliate with the Union and suggested Godoy go work for the Union if he was going to continue to support it. Finally, Gomes warned Godoy against wearing the union shirt again if he did not want to be terminated.[20]

D. The Flyer Distribution and the Discharges

On April 24, accompanied by members of other labor organizations, Recinos distributed flyers at the Respondent's worksites. The flyers protested the Respondent's refusal to voluntarily recognize the Union and prohibition against Godoy and Cruz wearing union shirts while working. The flyers also stated that the Union had filed unfair labor practice charges

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[16] Acosta did not dispute Recinos' credible version of this conversation. (Tr. 209.)

[17] Acosta did not refute the accounts of Cruz and Godoy as to their discussions later during the day on April 10. (Tr. 131; 169–170.)

[18] While Cruz, Godoy, Recinos, and Acosta provided fairly consistent versions of the union shirt incident, Daneshpour and Acosta contradicted each other as to what happened that day. Daneshpour, in his June 25, 2007 position statement, asserted that Godoy and Cruz refused to follow Acosta's directive that they get to work or leave and, instead, decided to leave the project site and join the Union's picketing activity. (GC Exh. 30; Tr. 276–277.) In any event, Daneshpour was aware that Godoy and Cruz distributed prounion shirts to other employees. (Tr. 60–68; GC Exhs. 8–11.)

[19] I based this finding on Godoy's credible and undisputed testimony. (Tr. 131–133, 136.)

[20] I based this finding on Godoy's credible testimony, as corroborated by Luis Gomes' concededly negative version of their encounter: "[I] have no problem at all if they become Union members" and "if you guys not happy, you don't have to work for me. You can leave. You can go work for somebody else." (Tr. 47, 136–138, 286–287.)

against the Respondent.[21] Acosta brought Daneshpour a copy of the flyer.[22]

Godoy and Cruz did not distribute flyers, but Daneshpour believed they did.[23] As a result, Acosta called Godoy at home later that morning, told him not to come to work, and to wait for a call. Acosta also explained that he was on his way to a meeting at the Respondent's office regarding the Union. At around noon, Acosta arrived at Godoy's home and told him that he had been discharged because he supported the Union. Acosta added that because he supported the Union, Luis Gomes regretted having hired any iron workers and that he wanted to fire all of them. Acosta showed him the flyer that the Union distributed to employees earlier that morning.[24]

Cruz reported to work the morning of April 24 at the National Harbor site. Domenech, the project superintendent, told him to leave because he could not work that day. Cruz then called Acosta, who said that "George," one of the Respondent's owners, directed Domenech to terminate Cruz because he distributed union flyers at the workplace and made unfavorable comments about the Respondent.[25]

The Respondent later attempted to justify the discharges of Godoy and Cruz on the grounds that they were not being productive and failed to follow directions. It did not, however, document the discharges, much less the reasons for them. Moreover, at the end of each workday, employees would receive feedback from Acosta as to the quality of their work. Cruz and Godoy did not receive bad evaluations.[26] Based on information obtained from Acosta, Daneshpour was really concerned about the fact that Godoy and Cruz complained about their wage rates, wore prounion shirts, and were communicating with Recinos.[27] They did not,

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[21] Although Recinos filed unfair labor charges relating to the T-shirt incident on April 13, the Regional Director did not serve a copy of it on the Respondent until April 25. However, the Respondent became aware of the charges when the flyers were distributed on April 24. (Tr. 210–212; GC Exhs. 17, 19.)

[22] Daneshpour conceded these facts in his position statement, to which a copy of the flyer was attached. (Tr. 55–57; GC Exh. 30.)

[23] While there is no credible evidence that Godoy and Cruz distributed flyers, Daneshpour's position statement revealed his belief that they did. He also asserted that the general contractor's project manager and other subcontractors were upset with the distraction caused by the flyer distribution. There is no evidence, however, that he conveyed this to anyone outside of the Respondent's management. (Tr. 51, 86–87, 138, 142, 173.)

[24] Although Acosta was called to testify as Respondent's witness, he did not refute or otherwise deny having made these statements to Godoy. (Tr. 141–142; GC Exh. 19.). He also failed to rebut the credible testimony of Godoy or Cruz that he never apprised them of unsatisfactory performance or their disobeyance of work orders. (Tr. 90–91, 105–110, 147, 158–160, 237–238.) Accordingly, Daneshpour's assertion that they were terminated for poor productivity and refusing to follow the orders of a foreman were not supported by any credible evidence. (Tr. 70–71.)

[25] Acosta did not refute Cruz's credible testimony about this encounter. (Tr. 170–173, 177, 234–235.)

[26] I based this finding on Cruz' credible testimony that Acosta provided an oral evaluation at the end of each workday and the fact that Acosta never testified to having provided either Cruz or Godoy with a bad evaluation. (Tr. 158–159.)

[27] I did not credit Daneshpour's testimony that he based the discharges on Acosta's reports of nonproductivity and failure to follow orders. First, Acosta's testimony was devoid of any such reference. Second, Daneshpour's motivation was evident in his assertion that Godoy and Cruz

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however, communicate with Recinos while they were working at the worksite.[28]

III. Analysis

A. The 8(a)(1) Allegations

The General Counsel contends that the Respondent violated Section 8(a)(1) in several respects: on April 10, 2007, by Acosta directing Godoy and Cruz to remove shirts containing information supporting the Union, telling them they could not work if they continued to wear the shirts, and promising to rehire them if they decided not to wear the shirts; on April 11, 2007, by Acosta interrogating Godoy as to whether he intended to wear a union shirt if he were recalled to work and then threatening Godoy with stricter enforcement of work rules and loss of overtime; on April 18, 2007, by Luis Gomes interrogating Godoy about his support for the Union and threatening to terminate Godoy if he wore the union shirt again; and on April 24, when Acosta told Godoy and Cruz they were terminated because they supported the Union. The Respondent asserts that: (1) it properly denied the employees the right to wear union shirts on the worksite in order to "preserve workplace efficiency and good order" and there was no interrogation involved; (2) there was no evidence that Godoy and Cruz distributed flyers and, thus, did not engage in protected concerted activity; and (3) there is no credible evidence that Cruz and Godoy were threatened with discharge for supporting the Union.

It is an 8(a)(1) violation for an employer to engage in conduct which reasonably tends to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights to self-organization, to form, join, or assist a labor organization. *Alliance Steel Products,* 340 NLRB 495 (2003); *Philips Petroleum Co.,* 339 NLRB 916 (2003); *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959). In making this determination, the Board uses an objective standard to determine whether the statements would reasonably tend to coerce an employee. *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004). As such, an employer's motive for the inquiry, or the success or failure of the coercion, is irrelevant. *American Tissue Corp.,* 336 NLRB 435, 441 (2001).

The use of shirts promoting the Union at work by Godoy and Cruz constituted Section 7 activity. The Board has long held that an employer may not prohibit employees from wearing union insignia absent evidence of special circumstances. *RCN Corp.*, 333 NLRB 295, 303 (2001); *St. Luke's Hospital*, 314 NLRB 434, 435 (1994). The burden of demonstrating such circumstances rests on the employer and has been said to include obscenity, interference with production, safety or the image a company wants its employees to project to customers, disparaging comments about the company's product or service, and the fomentation of disciplinary problems. *Escanaba Paper Co.*, 314 NLRB 732 (1994), enfd. sub nom. *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996). Simply relying on "general, speculative, isolated or conclusory evidence of potential disruption does not amount to special circumstances." *Caterpillar, Inc.*, 321 NLRB 1178, 1180 (1996), quoting *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990).

"were just following the direction of [Recinos] by phone" and an even vaguer assertion that their "heart" was not into the work, and they were distracted. (Tr. 88–89, 91.) Lastly, the alleged concerns with productivity only surfaced weeks after the union activity began. (Tr. 70–73, 234–235.) Domenech, the Respondent's supervisor at the National Harbor jobsite, testified that Cruz worked there for 2–3 days, was not productive, and he decided he did not need Cruz. His testimony was vague as to time frame and utterly lacking in specifics. (Tr. 294–297.)

[28] I base this finding on the credible testimony of Godoy and Cruz. (Tr. 147, 176.)

Daneshpour testified that the Respondent had a verbal policy requiring employees to *usually* wear long-sleeve shirts while working. The union shirts worn by Godoy and Cruz on April 10 were short-sleeve. However, Daneshpour's testimony indicated that there were times when long-sleeve shirts were not worn. More importantly, neither he nor Acosta indicated a safety, productivity, or other operational concern regarding the use of the union shirts in the workplace. Acosta's assertion that the union shirts were disruptive on April 10 was utterly incredible in light of his claim that he was shorthanded without Godoy and Cruz in accomplishing the time-sensitive task of pouring just-delivered concrete. The alleged concern that other employees were distracted by going to read the shirts begs the question: how long does it take to read a shirt? There was no indication that employees refused to resume working after that brief interlude, that obscenity was involved, or that the activity was affecting the Respondent's image with its clients. Clearly, the Respondent failed to demonstrate the existence of special circumstances and, thus, Acosta's implementation or enforcement of a rule prohibiting employees from wearing union shirts while working violated Section 8(a)(1).

On April 11, Acosta informed Godoy that he could return to work, but only if he agreed to refrain from wearing the union shirt. Godoy agreed, but noted that he would continue supporting the Union. Acosta accepted that response, but added that Godoy would enjoy no more privileges or overtime work and would be terminated the next time he arrived late to work.[29] On April 18, Luis Gomes engaged in similar conduct. He approached Godoy during a work break and asked why he supported the Union. Gomes also remarked that it was wrong for Godoy to wear a union shirt, conveyed his disdain for the Union, suggested Godoy go to work for the Union, and warned Godoy against wearing the union shirt again if he did not want to be terminated.

The statements by Acosta and Luis Gomes to Godoy were problematic in two respects. First, one was the president and owner of the Company; the other was the worksite foreman. Second, the statements were made shortly after Acosta's unlawful directive that Godoy and Cruz refrain from wearing union shirts at the workplace. Third, they inquired as to Godoy's support for the Union and, in Acosta's case, indicated a precondition that Godoy would have to refrain from wearing the union shirt if he wanted to return to work. In Gomes' case, he suggested such activity would be met by termination. Under the totality of the circumstances, the interrogations by Acosta and Luis Gomes interfered with Godoy's exercise of his Section 7 rights. See *Alliance Steel Products*, 340 NLRB 495 (2003); *Rossmore House*, 269 NLRB 1176, 1177 (1984). Secondly, their warnings that Godoy's continued support for the Union would result in more restrictive conditions of employment or even termination constituted unlawful threats. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Palms Hotel & Casino,* 344 NLRB 1363, 1387 (2005).

On April 24, Acosta went to Godoy's home and told him that he was terminated because of his support for the Union. Alluding to a flyer handed out by Recinos and other union organizers to employees earlier that morning, Acosta added that Luis Gomes wanted to terminate all of the iron workers because of the Union. While there was no credible proof that either Godoy or Cruz was involved in the flyer distribution, the flyers referred to Godoy, Cruz and the April 10 union shirt incident. Acosta's statements conveyed to Godoy the Respondent's

[29] I did not arrive at a separate finding that Acosta promised to Godoy that he could return to work if he agreed not to wear a union shirt because that statement was subsumed by the interrogation.

inclination to meet protected concerted activity with adverse action. As such, Acosta's statements were clearly coercive and violated Section 8(a)(1).

B. The 8(a)(3) Allegations

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) on April 10 when Acosta told Godoy and Cruz to leave the worksite because they were wearing union shirts, and again on April 24 when the Respondent terminated Godoy and Cruz because they engaged in activity supporting the Union. The Respondent contends that Godoy and Cruz were directed to leave the worksite on April 10 because they refused to remove their union shirts, which were distracting other workers, and terminated on April 24 for poor productivity and/or failing to follow orders.

Section 8(a)(3) provides, in pertinent part, that it is "an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that an employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. See also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel establishes its prima facie case, the burden of persuasion shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494 (2006). Simply presenting a legitimate reason for its actions is not enough. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 966 (2004); *T&J Trucking Co.*, 316 NLRB 771, 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

Most of the *Wright Line* factors are not disputed. Godoy and Cruz attended union organizing meetings and wore shirts promoting the Union at the worksite. Acosta knew that both engaged in protected concerted activity, as he attended the same meetings with union officials. Acosta was initially interested in improving employees' terms and conditions of employment. However, torn between the prospects of affiliating with the Union and facing the scorn of his employer, Acosta ultimately chose to placate the latter. He reported the concerns raised by Godoy and Cruz about their allegedly deficient wage rate, their interest in union affiliation, and their use of union shirts at the worksite. Daneshpour, in his pretrial position statements and trial testimony, further conceded this knowledge. The Respondent took adverse action against Godoy and Cruz by precluding them from work on April 10, and terminating them on April 24.

The Respondent does not dispute that Acosta's decision to send Godoy and Cruz home on April 10 was motivated solely by the fact that they were wearing the union shirts. It attempted, however, to justify Acosta's action on the ground that the shirts distracted other workers. As previously explained, that argument is baseless. Accordingly, the discipline of Godoy and Cruz, essentially 1-day suspensions, resulting from such Section 7 protected conduct violated Section 8(a)(3) and (1). *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Smithfield Packing Co.*, 344 NLRB 1 fn. 20 (2004).

Equally as hollow are the Respondent's contentions that the terminations of Godoy and Cruz on April 24 were motivated purely by performance considerations and not their union activity. The record is replete with instances of antiunion animus: Acosta's April 10 directives that Godoy and Cruz remove their union shirts and then leave after they refused to comply, coercive statements by Acosta and Luis Gomes that employees refrain from wearing union shirts if they wished to continue working for the Respondent; Acosta's statement to Godoy that

he was terminated because of his support for the Union; and trial testimony by Luis Gomes and Daneshpour conceding their opposition to the Union. Lastly, in addition to the overwhelming evidence that the Respondent was hostile to the Union, the timing of the Godoy and Cruz discharges was suspicious. *La Gloria Oil*, 337 NLRB 1120, 1124 (2002); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1053 (1991). Godoy and Cruz were terminated a few hours after flyers referring to them and the April 10 union shirt incident were distributed by union organizers at the Respondent's worksites. Neither was present at the worksite when the flyer distribution took place, but Acosta shared with Godoy that he had been terminated because of his support for the Union. Moreover, while Cruz was elsewhere when those comments were made, the fact that Cruz was terminated on the same day as Godoy supports a finding that Cruz' termination was also unlawfully motivated. *Yellow Ambulance Service*, 342 NLRB 804, 804 (2004), citing *Howard's Sheet Metal, Inc.*, 333 NLRB 361 (2001) (discriminatory discharge of one worker a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same prounion activity, was discriminatory). The General Counsel satisfied its initial burden under *Wright Line.*

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have disciplined Godoy and Cruz even in the absence of their union activity. *Monroe Mfg.*, 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Hicks Oil & Hicksgas,* 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). It did not do so. Godoy and Cruz were essentially suspended for 1 day, on April 10, when they refused to remove their union shirts at the worksite. As previously discussed, there was no legitimate reason for such action. Similarly, the Respondent's contention that Godoy and Cruz would have been terminated because of their lack of productivity and/or failure to follow directions on the job was baseless. Based on the foregoing, I find that the Respondent's 1-day suspension of Godoy and Cruz and their termination on April 24 were implemented in violation of Section 8(a)(3) and (1).

Conclusions of Law

1. Braga Construction Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Reinforcing Iron Workers Local Union No. 201 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act in the following respects: (1) on April 10, by prohibiting employees from wearing shirts promoting the Union while they worked; (2) on April 11, by interrogating employees as to whether they intended to wear shirts promoting the Union and otherwise support the Union; (3) on April 11 and 18, by threatening employees that their support for the Union would result in termination or other restrictive conditions of employment; and (4) on April 24, by informing an employee that he was terminated because of his support for the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by: (1) suspending Godoy and Cruz for 1 day on April 10 because they wore shirts to work which stated support for the Union; and (2) terminating Godoy and Cruz on April 24 because they continued to support the Union.

5. By engaging in the conduct described above, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having unlawfully suspended for 1 day and then terminated Darwin Godoy and Kevin Cruz, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Braga Construction Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting an employee from wearing clothes displaying a union insignia while working.

(b) Discharging or otherwise discriminating against any employee for supporting Reinforcing Iron Workers Local Union No. 201 or any other union.

(c) Interrogating any employee about union support or union activities.

(d) Threatening any employee with job loss for himself or other employees because of employee support for union representation.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Darwin Godoy and Kevin Cruz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Darwin Godoy and Kevin Cruz whole for any loss of earnings and other benefits, with interest, suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Gaithersburg, Maryland facility copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 2007.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,[32] at its own expense, to all employees who were employed by the Respondent at its Wheaton, Dulles Station, and National Harbor project sites at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 2008

Michael A. Rosas
Administrative Law Judge

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and abide by this Notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representation of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Reinforcing Iron Workers Local Union No. 201 or any other union.

WE WILL NOT threaten or coercively question you about your union support or activities.

WE WILL NOT prohibit you from wearing clothes displaying a union insignia while working.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Darwin Godoy and Kevin Cruz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Darwin Godoy and Kevin Cruz whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Darwin Godoy and Kevin Cruz, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

JD–37–08
Gaithersburg, MD

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.